

1 MAGISTRATE JUDGE KAREN L. STROMBOM
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 UNITED STATES OF AMERICA,) No. CR13-5598
11 Plaintiff,)
12 v.) DEFENDANT'S TRIAL BRIEF
13 RICARDO M. CHARLES,)
14 Defendant.)
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16 Comes now the defendant, Ricardo Charles, by his attorney, Assistant Federal
17 Public Defender Kyana Givens, and submits the following trial brief for the Court's
18 consideration.

19 **I. INTRODUCTION**

20 Ricardo Charles is charged in a one count information with operating a motor
21 vehicle while under the influence of alcohol or drugs, in violation of 18 U.S.C. § 7 and 36
22 C.F.R. § 4.23.

23 Trial is scheduled to commence on January 13, 2014 at 1:30p.m.

24 **II. STATEMENT OF FACTS**

25 On July 25, 2013, Mr. Charles and his girlfriend, Violet Snell, were driving home
26 from a joint tribe event in Neah Bay. It was a warm summer day and they decided to stop
at the Olympic National Park Storm King Boat Launch to go swimming. When they
arrived at the boat launch, Ms. Snell pulled her vehicle safely off the road. They went

1 down to the lake to swim. Ms. Snell decided not to swim because she was not feeling
2 well. She returned to the vehicle and laid down in the reclined passenger seat and fell
3 asleep. Mr. Charles continued swimming and returned to the vehicle later. He got into
4 the driver's front seat and talked to his girlfriend. Within minutes a Park Ranger
5 approached their vehicle and asked Mr. Charles for his driver's license and registration.
6 The officer will testify he smelled alcohol and could see signs that Mr. Charles was
7 intoxicated. He conducted Standard Field Sobriety Testing and obtained a voluntary
8 breath sample from Mr. Charles using a Portable Breath Tester. Mr. Charles was arrested
9 and taken to Clallam County Jail where two BAC tests were administered. The first BAC
10 test resulted in a .188 reading and the second test resulted in a .183 reading. Eventually
11 Mr. Charles and the vehicle were released to Ms. Snell who drove them home.

12 **III. ELEMENTS OF THE ALLEGED OFFENSE**

13 There are three elements of operating a motor vehicle while under the influence of
14 alcohol or drugs in violation of 36 C.F.R. sec. 4.23. They are (1) that the defendant drove
15 a motor vehicle; (2) that the defendant either had .08 grams or more of alcohol per 210
16 liters of breath or was under the influence of or affected by alcohol; and (3) that the acts
17 occurred in a federal enclave, in this case, Olympic National Park, Washington.

18 **A. Physical Control of a Vehicle While Under the Influence.**

19 The citation and DUI arrest report cite Mr. Charles for violating RCW 46.61.502
20 or RCW 46.61.504. The statute which criminalizes being in physical control of a motor
21 vehicle while under the influence of alcohol is RCW 46.61.504. That statute makes it a
22 crime for a person to "ha[ve] actual physical control of a vehicle" and either: (a) have an
23 alcohol concentration of .08 or higher within two hours after being in actual physical
24 control of the vehicle, (b) be "under the influence of or affected by intoxicating liquor or
25 any drug," or (c) be "under the combined influence of or affected by intoxicating liquor

1 and any drug.” RCW 46.61.504. The statute parallels the driving under the influence
 2 statute for individuals who are in physical control of a vehicle but not driving.

3 Subsection (2) of the physical control statute creates an exception, presumably to
 4 encourage drunk drivers to pull over if they start feeling intoxicated. That subsection
 5 states, in pertinent part: “No person may be convicted under this section if, prior to being
 6 pursued by a law enforcement officer, the person has moved the vehicle safely off the
 7 roadway.” “Safely off the roadway” is not defined in the statute but has been found to be
 8 satisfied when a car was pulled three feet off the road on the shoulder, was not a hazard
 9 to traffic, and presented no safety issue other than having the engine running, *see State v.*
 10 *Reid*, 988 P.2d 1038, 1041-42 (Wash. App. 1999).

11 The Washington courts have held that this is an affirmative defense, so that “[i]t is
 12 up to the defendant . . . to present the evidence which will exculpate him.” *McGuire v.*
13 City of Seattle, 642 P.2d 765, 769 (Wash. App. 1982). The courts have held that this is
 14 only an “initial burden,” however, so that, once the defendant produces evidence, “the
 15 burden falls upon the State to rebut that evidence.” *State v. Reid*, 988 P.2d at 1045.
 16 Thus, there is a burden of production on the defendant, but then a burden of persuasion
 17 on the prosecution.

18 In this case, Mr. Charles intends to raise the affirmative defense that the vehicle
 19 was safely off the road prior to being pursued by a law enforcement officer.

20 IV. EVIDENTIARY AND DISCOVERY ISSUES

21 A. Admissibility of Department of Transportation Manuals and/or 22 Studies.

23 Depending on what, if any, testimony the officer offers about Mr. Charles’
 24 performance on the Field Sobriety Tests, the defense may impeach him and/or rebut his
 25 testimony with Department of Transportation studies and/or manuals regarding such
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1 testing. Such manuals and studies are admissible in evidence as party admissions by the
2 government. See United States v. Van Griffin, 874 F.2d 634, 638 (9th Cir. 1989)

3 **B. Rule 404(b) Evidence.**

4 The defense requests notice of any evidence the government might seek to offer
5 under Rule 404(b) of the Federal Rules of Evidence. Such notice is required by Rule
6 404(b), and failure to give notice when notice is requested precludes the government
7 from offering such evidence at trial. See *United States v. Vega*, 188 F.3d 1150, 1154-55
8 (9th Cir. 1999).

9 At the time of filing this brief, the government has not given notice of any Rule
10 404(b) evidence here. It should be precluded from giving any at this late date. All Rule
11 404(b) evidence should be excluded, including evidence of any other driving under the
12 influence charge associated with Mr. Charles.

13 **C. Exclusion of Witnesses.**

14 The defense respectfully requests exclusion of all witnesses in the case, pursuant
15 to Rule 615 of the Federal Rules of Evidence.

16 **D. Objections to Documentary Evidence.**

17 Mr. Charles notes objections to the introduction of a number of items the
18 government may attempt to introduce at trial.

19 1. Mr. Charles objects to the introduction of the citations, the police
20 reports and the WACIC check results as hearsay. Fed. R. Evid. 801.
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1 2. Mr. Charles also objects to the introduction into evidence of the
2 citations and the WACIC results on the grounds of relevancy, pursuant to Fed. R. Evid.
3 401.

4 **E. Motion to Exclude Opinion Testimony Regarding Level of**
5 **Intoxication.**

6 Mr. Charles moves to exclude opinion testimony from any witnesses regarding his
7 degree of intoxication on the grounds that such opinion testimony is precluded by Fed. R.
8 Evid. 704(b). Opinion testimony on Mr. Charles' degree of intoxication would state "an
9 opinion or inference as to whether the defendant did or did not have the mental state or
10 condition constituting an element of the crime charged...Such ultimate issues are matters
11 for the trier of fact alone." Fed. R. Evid. 704(b).

13 On the Washington State Patrol DUI Arrest Report it was the officer's opinion that
14 Mr. Charles had an "obvious" impairment due to the use of alcohol. The defense expects
15 the arresting officer(s) to attempt to testify to the same conclusions. Impairment due to
16 alcohol is an element of the offense of driving under the influence of alcohol, with which
17 Mr. Charles is charged. 36 C.F.R. § 4.23. Thus, under Fed. R. Evid. 704(b), the degree
18 of intoxication is for the jury alone to determine. Fed. R. Evid. 704(b); *United States v.*
19 *Lewis*, 837 F.2d 415 (9th Cir. 1988), *cert. denied* 488 U.S. 923, 109 S.Ct. 304, *reh'g*
20 *denied* 488 U.S. 987, 109 S.Ct. 544; *United States v. Juvenile Male*, 864 F.2d 641 (9th
21 Cir. 1988). Testimony by witnesses containing conclusions regarding the degree to
22 which Mr. Charles was or was not intoxicated must be excluded.
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F. Motion to Exclude BAC Results Unless Related to Time of Driving.

Mr. Charles moves this Court to exclude the results of the BAC Verifier Datamaster test performed on him unless the government can demonstrate that the result accurately reflects the level of alcohol in Mr. Charles' blood at the time of driving. Unless the government can establish that the results of the breath-alcohol test performed on Mr. Charles accurately reflect the level of alcohol at the time of driving, the results are irrelevant, and thus inadmissible. Fed. R. Evid. 401 and 402. Alternatively, any probative value of such a result, absent evidence that it reflects Mr. Charles' breath-alcohol level at the time of driving is substantially outweighed by prejudice. Fed. R. Evid. 403.

G. Motion to Exclude Reference to BAC Results Until Properly Admitted.

Mr. Charles moves pursuant to Fed. R. Evid. 402, 403 and 704(b) to exclude reference to the results of the BAC Verifier Datamaster test performed on him until the test result has been properly admitted into evidence.

DATED this 6th day of January, 2014.

Respectfully submitted,

s/ *Kyana Givens*
Assistant Federal Public Defender
Attorney for Ricardo Charles
1601 Fifth Avenue, Suite 700
Seattle, WA 98101
Phone: (206) 553-1100
Fax: (206) 553-0120
Kyana_Givens@fd.org

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of filing to Assistant United States Attorney Barbara Sievers.

s/ *Carolynn Calder*
Paralegal
Federal Public Defender's Office
1601 Fifth Avenue, Suite 700
Seattle, WA 98101
Phone: (206) 553-1100
Fax: (206) 553-0120
Carolynn_Calder@fd.org